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No. 06-1072

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In The

Supreme Court of the United States

GEORGE MIYASHIRO,

Petitioner,

vs.

Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONER'S REPLY BRIEF TO RESPONDENT STANLEY H. ROEHRIG'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

REASONS FOR GRANTING THIS PETITION 4

A. There Is a Recognized Right to Counsel Of Choice for Civil Litigants 4

B. Roehrig States No Basis for Disqualifying Albertini for *Pro Hac Vice* Status 6

C. Roehrig's Accusation About Miyashiro are False and Irrelevant 7

D. Roehrig Incorrectly Asserts this Court Lacks Jurisdiction to Hear Petition 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Cox Broadcasting Corporation v. Cohen, 420 U.S. 469 (1975) 8

Chronometrics v. Sygen, Schaeffer and Fatt, 110 Cal.App.3d 597 (1980) 7

Gray v. New England Telephone and Telegraph Co., 792 F.3d 251 (1st Cir. 1986) 4

Obert v. Republic Western Insurance Company, 190 F. Supp. 2d 279 (D.R.I. 2002) 4, 5

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980) 4

Powell v. Alabama, 287 U.S. 45 (1932) 4

U.S. v. Gonzalez-Lopez, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) 4, 6

INTRODUCTION

It is fortuitous that Petitioner George Miyashiro ("Miyashiro") is able to file a reply to the "Brief of Respondent Stanley H. Roehrig in Opposition to Petition for Writ of Certiorari" (the "Opposition"). First of all, Stanley H. Roehrig ("Roehrig") is not the "Respondent" in this action and he states no basis for his alleged right to file the Opposition and his brief should be ignored.

The Opposition was not served upon Miyashiro. Someone attests that it was, but Miyashiro never received it. When no Opposition was received, Eugene Albertini ("Albertini") investigated and found the Fed. Ex. delivery had been "stolen." Albertini requested a courtesy copy from Roehrig, but was curtly refused. Miyashiro had to scramble to obtain a copy elsewhere, leaving little time for review, research and drafting of this Reply.

Roehrig tries to divert the Court's attention from the real issue here: whether Miyashiro had a constitutional right to the counsel of his choice and whether that right was violated by the actions and decisions of the courts in Hawaii, including the Supreme Court there. There *is* a constitutional right to counsel of choice even in civil cases. Many of Roehrig's arguments accentuate Miyashiro's need for counsel of his choice. Miyashiro was hampered in obtaining counsel by the refusal of most local attorneys to antagonize Roehrig. Roehrig, after agreeing to Albertini's participation in preliminary and discovery stages, decided to gain an extra advantage by precluding the most knowledgeable counsel from meaningfully participating at trial. Roehrig's actions clearly works to abridge and deny Miyashiro's constitutional rights to due process.

BACKGROUND

The Opposition *implicitly concedes* that the Hawaii Court erred through the actions of Judge Ibarra, who did not *recuse* himself until after hearing, and denying, the Motion to Allow Albertini to appear as counsel *pro hac vice*. Judge Ibarra stated in denying the status:

> "He had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case."

Roehrig *intentionally* tries to mislead this Court, implying that somehow the Court found that Albertini had been representing Miyashiro longer than he actually had, suggesting the representation commenced in 2002. The record shows this to be false. Albertini was never contacted until December 2003 and later did extensive research into underlying facts and supporting law, in early 2004, *not 2002 as misrepresented*. Albertini had Miyashiro ship boxes of pertinent documents to California, to be organized by Albertini & Gill ("A&G") Albertini researched the Hawaii Rules of Professional Conduct ("HRPC"), and case law relating thereto. Albertini prepared a draft of a Complaint and then met with legal malpractice expert, Randall Roth, and local counsel David Gierlach in Hawaii, to review the Complaint. Evidence clearly showed Roehrig violated no fewer than **eighteen (18) HRPC** and engaged in conduct beneath the standard of care. Albertini spent hundreds of hours developing deposition outlines, cross-examination questions and deposition summaries. In so doing. Albertini developed a font of knowledge crucial to

developing evidence for Miyashiro's case. A First Amended Complaint was filed **August 4, 2004**; the application by Albertini to appear *pro hac vice* was argued on **October 11, 2004**. Roehrig's accusation, "Albertini had consulted extensively with Miyashiro since 2002," is false and misleading.

Roehrig also asserts Miyashiro could easily have found alternative lead counsel, contacting only a dozen of more than 5,000 attorneys in Hawaii. This is another intentional misrepresentation. In fact there are only about 3,500 practicing attorneys in the state and most represent institutional clients. Miyashiro contacted more than fifty attorneys on the big island of Hawaii, and more on Oahu. Miyashiro was turned down by **every one of them**. When hiring malpractice experts, a number stated that Roehrig's malpractice was manifest, but would not risk antagonizing such a powerful man.

The refusal to allow Albertini to appear and argue in court effectively deprived Miyashiro of an essential skill developed by Albertini's extensive work and knowledge called "*knowledgeable spontaneity,*" which could have directed the Court during argument to a cogent piece of evidence, which might have changed the outcome of the Court's rulings. This skill was lost to Miyashiro by restrictions placed on Albertini's *pro hac vice* status which deprived George of his constitutional right to counsel of choice.

REASONS FOR GRANTING THE PETITION

A. There Is a Recognized Right to Counsel Of Choice for Civil Litigants.

U.S. v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006), was a criminal case, but Miyashiro believes that the principles articulated therein are equally applicable to the civil litigation. The erroneous deprivation of counsel of choice at trial is just as "unquantifiable" and "indeterminate," and can potentially be just as devastating, in a civil case as in a criminal. See, *id.* 2562-2565.

The cases establishing a right to counsel of choice in civil cases were cited in the Petition and were essentially ignored by Roehrig in the Opposition. Among the cases cited was *Powell v. Alabama,* 287 U.S. 45, 64 (1932), which stated that denial of the counsel of choice can be a denial of due process in criminal **and civil** cases. The court in *Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1118 (5th Cir. 1980), clarified "In each instance, the right to counsel is one of constitutional dimensions and **should thus be freely exercised without impingement**." (Emphasis added.) The Court in *Gray v. New England Telephone and Telegraph Co.,* 792 F.3d 251, 257 (1st Cir. 1986), explained further that the right to counsel of choice in civil cases is not identical to criminal cases, but still affects due process.

Roehrig also opines that the right to counsel of choice does not extend to out-of-state attorneys. He cites as authority *Obert v. Republic Western Insurance Company,* 190 F. Supp. 2d 279, 298 (D.R.I. 2002). Roehrig misquotes *Obert*. He asserts *Obert* holds that a civil litigant has no right to counsel of choice. The Obert decision states nothing of the kind and especially not at page 298 of the

decision, Roehrig's alleged point cite. Most of *Obert* discusses disqualification of the judge; near the end *pro hac vice* status is also discussed. *Obert* holds that there is no property right for an attorney to be admitted *pro hac vice* in Rhode Island. *Id.* The court stated, "Although counsel has no property right to admission pro hac vice, some courts have implied that once admitted pro hac vice, a lawyer must have a limited property right mandating some degree of procedural due process prior to disqualification." *Id.* The court was thus discussing an **attorney's right** to *pro hac vice* status, not a **client's constitutional right** to be represented by counsel of choice.

When the courts talk of a litigant's right to counsel of choice, there is no basis to assume it is limited solely to local counsel. That would contradict the right to choose, by limiting the choices. Roehrig cites no authority for such limitation. Rather it is inimical to the constitutional right. Where, as here, the client is unable to obtain local counsel of choice because of the influence and power of the opposing litigants, it would effectively destroy the due process rights of the litigant to limit him to choice among local counsel. Had Roehrig not been a political figure in Hawaii, there would undoubtedly not have been a denial of Miyashiro's counsel to *pro hac vice* status.

Judge Masuoka essentially relied on Judge Ibarra's improper ruling in denying the status to Albertini. Judge Ibarra ruled Miyashiro had access to many attorneys on the Island of Hawaii, as well as elsewhere in the state. Judge Ibarra was simply wrong, and the evidence submitted to him showed that Roehrig was such a substantial political figure no one wanted to handle the case. At the Hawaii Supreme Court, Roehrig argued that authorities cited by Miyashiro only applied to criminal cases, not civil.

That is incorrect. The *Gonzalez-Lopez* case was a criminal case, but other authority states the constitutional right to counsel of choice in civil cases as well. This is one reason this Court should review this matter, and clarify that the right of "*counsel of choice*," applies in ***both*** criminal and civil matters.

B. Roehrig States No Basis for Disqualifying Albertini for *Pro Hac Vice* Status.

Roehrig also argues that Albertini was unfit to practice *pro hac vice* in Hawaii, Roehrig admits Albertini was admitted *pro hac vice* in Hawaii four (4) other times and Roehrig himself agreed to *pro hac vice* for Albertini status during the discovery stage. The Court's Order controls the basis for denying the status to Albertini, not what Roehrig's counsel argued at a hearing. In its ruling, the Court mentions the earlier *pro hac vice* representations, but does not say it was improper or that Albertini was guilty of some misconduct therein. If Albertini's actions were reprehensible (including the false allegation Albertini practiced in Hawaii without a license because of his pretrial work in California), there could have been no reason to allow his participation further, but the Court's ruled otherwise.

Actually, Roehrig found Albertini was too aggressive and effective to be allowed to conduct the trial as lead counsel. It was this that actuated Roehrig's opposition to full *pro hac vice* status for Albertini. But that is the very point Miyashiro makes here: he hired counsel, very effective and allowed to conduct discovery, draft pleadings and review documents, so developed primary knowledge of the case and had the requisite skills to prepare papers and

argue at hearings and eventually trial. The Court ignores its former conduct and forbids Albertini to participate meaningfully at trial and hearings, where his accumulated knowledge and skills are most needed.

Roehrig accuses Albertini of misconduct in the late 1970's. As evidence, he cites *Chronometrics v. Sygen, Schaeffer and Fatt,* 110 Cal.App.3d 597 (1980) and suggests this case as a basis for the denial of *pro hac vice* status. First, the trial Court never cited the *Chronometrics* decision in its denial of the status. In fact when the case and its circumstances were raised, Judge Ibarra stated, "I'm not even going to consider that." See, Court's transcript of proceedings Oct. 11, 2004, at pg. 39, lns. 4-5. Second, despite knowledge of the *Chronometrics* case, Roehrig had no problem agreeing to *pro hac vice* for discovery. Later Roehrig decided that conduct twenty-five years earlier made Albertini unfit. Roehrig did not want to bar Albertini completely, only blunt his effectiveness.

C. Roehrig's Accusation About Miyashiro are False and Irrelevant.

Roehrig claims he knew right away Miyashiro was a crook and embezzler, but tried to help him anyway. For support, Roehrig cites to his victory in summary judgments and he even has the audacity to assert that Miyashiro has admitted being an embezzler. Of, course, the merits of Miyashiro's lawsuits wherein Roehrig represented him are irrelevant for purposes of deciding whether he had a right to counsel of his choice and whether he was improperly deprived of that right here. Roehrig's version of the events would be laughable if the consequences of it were not so tragic. Miyashiro was not an embezzler and,

despite Roehrig's accusations, there is no evidence that he was, regardless of what the rulings on summary judgments may claim; Miyashiro never admitted being an embezzler.

D. Roehrig Incorrectly Asserts this Court Lacks Jurisdiction to Hear Petition.

Roehrig lacks standing to appear here, but because of rulings on summary judgment motions and appeal from them by Miyashiro, he claims this Court lacks jurisdiction to hear Miyashiro's Petition. Roehrig further asserts the ruling on the Petition for Writ of Mandamus by the Supreme Court of Hawaii is not final, because of this appeal. Miyashiro has appealed the rulings on the summary judgment motions and mentioned denial of *pro hac vice* status therein. At issue here, however, is the denial of Mandamus by the Hawaii Supreme Court. That cannot be at issue in the appeal. Only the denial of the application for *pro hac vice* status by the trial court will be at issue. It is ingenuous for Roehrig to suggest, as he does, that an appellate court will be able to reverse the Supreme Court of Hawaii. The ruling of the Hawaii Supreme Court is effectively final. To be clear, procedurally, the Hawaii Supreme Court's decision cannot be reversed through the appeal; it is now final and must be addressed by this Court.

Even assuming Roehrig were right about the denial of the status and its part in the appeal, Roehrig himself cites several cases, including *Cox Broadcasting Corporation v. Cohen,* 420 U.S. 469 (1975), which list exceptions to the "final judgment rule" that, where "anything further remains to be determined by a state court" this Court will

not entertain jurisdiction. As pointed out, nothing further remains to be done regarding the denial of Mandamus by the Hawaii Supreme Court, but any or most of the exceptions can apply here: (1) "case where the ruling renders further State proceedings preordained" – this is certainly the case here, where future proceedings must be preordained to the extent that Albertini will be allowed to participate *pro hac vice*; (2) "case where the issue will survive and require decision regardless of further State proceedings" – as already explained, the appeals cannot lead to overturning the denial of the Writ of Mandamus, so it will remain to be done by this Court regardless of what happens; (3) "cases where further State proceedings will bar review of an important federal issue" – the right to counsel of choice in civil cases is an important federal issue, as it goes to the heart of constitutional rights, including equal protection, as, at least in some parts of the country, civil litigants do have a right to counsel of their choice, whereas in Hawaii, the highest court does not recognize it, meaning disparate treatment and the defeat of equal protections, so if the denial of the Writ is overturned this important issue could be barred; and (4) "cases where resolution of the Federal issue will be preclusive of any further State proceedings" – this Court's ruling would be preclusive of further proceedings on this issue.

CONCLUSION

George Miyashiro is only asking for justice and fair play. That the great Stanley Roehrig and his cronies are so intent in denying Miyashiro his rights is most unsettling and strongly indicates that the intervention of this Court is necessary. George Miyashiro respectfully requests that this Court accept his Petition for Certiorari and grant full review by this Court.

March 24, 2007

Respectfully submitted,

GEORGE MIYASHIRO, *Petitioner*
In propria persona